

COMMENT

JUDICIAL PROTECTION OF MINORITY VOTING RIGHTS: THE CASE FOR CONSTITUTIONAL REFORM

Substantial numbers of citizens qualified to vote under State registration and election laws are being denied . . . the right to vote, by reason of their race or color.¹

The United States Commission on Civil Rights was created by Congress in 1957 to serve as a fact finding body and to investigate sworn allegations of citizens being denied voting rights because of color, race, religion, or national origin.² The Commission Report and testimony before recent congressional hearings³ indicate many examples of voting discrimination, primarily directed against aspiring Negro electors. The Commission concluded that, as of 1956, 60% of the Southern white population was registered to vote as compared to only 25% of the Negro population. In many counties, especially those with a majority non-white population, Negro registration was nearly non-existent.⁴ While the low voting percentage among Negroes is partially attributable to lack of education⁵ and apathy,⁶ much of the result comes from obstacles constructed by whites.

The right to vote is of particular importance to minority groups which suffer from deprivation of rights in other respects. It gives that group a significant leverage, frequently asserted through holding a balance of political power, with which to achieve a greater respect for its rights through the political process.

¹ Report of the United States Commission on Civil Rights 41 (1959) (hereinafter cited as Commission Report).

² Civil Rights Act of 1957, §§ 101-06, 71 Stat. 634-36 (1957), 42 U.S.C. §§ 1975-75e (1958). The Commission's life was extended from two to four years in 1959 by the act of September 28, 1959, Pub. L. 86-383, tit. IV, § 401, 73 Stat. 724 (1959), amending 71 Stat. 635 (1957), 42 U.S.C. § 1975c(b) (Supp. I, 1959).

³ "Hearings on S. 2684, S. 2719, S. 2783, S. 2814, S. 2722, S. 2785, and S. 2535, Before the Senate Committee on Rules and Administration," 86th Cong., 2d Sess. (1960) (hereinafter cited as 1960 Senate Hearings); "Hearings on S. 435, S. 456, S. 499, S. 810, S. 957, S. 958, S. 959, S. 960, S. 1084, S. 1199, S. 1277, S. 1848, S. 1998, S. 2001, S. 2002, S. 2004, and S. 2041, Before the Senate Subcommittee on Constitutional Rights of the Committee on the Judiciary," 86th Cong., 1st Sess., pts. 1-4 (1959) (hereinafter cited as 1959 Senate Hearings).

⁴ Commission Report 559-86, 587-89.

⁵ McGovney, *The American Suffrage Medley* 59-79, 88-104 (1949).

⁶ "Such [Negro] apathy may stem from lack of economic, educational or other opportunities, but it does not constitute a denial of the right to vote." Commission Report 52. See Lubell, *The Future of American Politics*, chs. 5 and 6 (2d ed. 1956).

The comment which follows attempts an analysis of the problem thus presented and an evaluation of the remedial legislation designed by Congress to protect voting rights. Deficiencies in this legislation will be pointed out and a potential solution advanced for the reader's consideration.

The right to vote is perhaps given fuller treatment in the Constitution than any other interest. Among others, article I, sections 2, 3, and 4, article II, section 1 and the twelfth, fourteenth, fifteenth, seventeenth, nineteenth, twenty-second and twenty-third amendments all deal with one aspect or another of the right to vote. The numerous constitutional amendments may suggest a lingering self-consciousness in Congress that voting rights have never been adequately treated. At the same time, the reader may well suspect that the very number of these amendments would militate against further changes in the near future.

I. THE PROBLEM

For nearly a century most of the Southern states have evaded by one means or another the clear intent of the fifteenth amendment of the Constitution of the United States. The pattern of conscious disfranchisement first found expression in force and intimidation.⁷ Left to its own devices in 1877, the South found that these means were no longer necessary; it became possible to "buy, steal or fail to count the Negro vote."⁸ With the power to set the qualifications for voting, the South had the "legal" means at hand to deprive the Negro of his newly won right of suffrage. Various devices were adopted to circumvent the fifteenth amendment, including literacy, property, residence and character qualifications, the grandfather clause, the poll tax, and the white primary.⁹

A. *The Present*

Every device of disfranchisement which the judiciary has destroyed has been replaced by a new scheme designed by the Southern states to achieve the same ends. Extra-legal restraints are the reserve force which remains available when legal restraints are nullified or repealed. The prevailing means currently employed to prevent Negroes from exercising their right to vote can be roughly separated into those that amount to "discriminatory application and administration of apparently non-discriminatory laws"¹⁰ in the registration process, and those less subtle means involving violence and intimidation.

⁷ K. H. Porter, *A History of Suffrage in the United States 196-97* (1918).

⁸ Myrdal, *An American Dilemma* 450 (1944).

⁹ McGovney, *op. cit. supra* note 5, at 53-56.

¹⁰ Commission Report 133.

Discriminatory application of the registration laws seems to have been contemplated from the outset. The Chairman of the Suffrage Subcommittee in the Virginia Convention declared: "I expect the examination with which the black men will be confronted to be inspired by the same spirit that inspires every man upon this floor and in this convention. *I do not expect an impartial administration of this clause.*"¹¹ The Chairman would not be disappointed by the techniques currently used to frustrate prospective Negro registrants. Illustrative of methods employed by state registrars to limit or prevent Negroes from political participation are those included in the district court's findings of fact in *United States v. Raines*:¹² a) The use of differently colored registration application forms for white and Negro voters; b) The keeping of separate registration and voting records for whites and Negroes according to race; c) Delaying action upon applications for registration by Negroes for periods up to two years, while not delaying such action with respect to applications by whites; d) In administering literacy tests, requiring Negroes to read and write a more lengthy and difficult paragraph of the Constitution of Georgia or of the United States than whites are required to read and write; e) In administering literacy tests, requiring Negroes to read aloud and to write from dictation while not so requiring white applicants, but, instead, requiring white applicants only to write by copying; f) Administering literacy tests to Negro applicants singly and apart from white applicants while administering such tests to white applicants in groups; and g) Requiring a higher standard of literacy of Negroes than of white applicants in passing upon the results of the literacy test (by examination of the Negroes pursuant to the provisions of the Georgia Voters' Registration Act of 1958 while continuing to test the whites under the more lenient terms of the 1949 Registration Act).¹³

¹¹ Porter, *op. cit. supra* note 7, at 218. Compare Edmonds, the Negro and Fusion Politics in North Carolina, 1894-1901, at 182 (1951); Official Proceedings of the Constitutional Convention of the State of Alabama, 1901, pt. III, at 2828 (1941); Official Journal of the Constitutional Convention of the State of Louisiana, 1898, at 380 (1898).

¹² 189 F. Supp. 121, 132-33 (M.D. Ga. 1960).

¹³ Comparable methods were recounted during the 1960 Senate hearings on the Civil Rights Act: 1) Requiring Negroes and whites to register in separate rooms and in separate parts of the courthouse; 2) Registrars frequently reporting for work late and leaving work early, thus reducing the number of hours available for Negro applicants; 3) Permitting only two Negro applicants in the registration room at the same time; 4) Requiring Negro applicants to read and transcribe articles from the Constitution of the United States, in addition to filling out the voter registration questionnaire; 5) Conversing with applicants while they write, which practice disturbs them and stimulates making errors; 6) Permitting a Negro to vouch for only two applicants per year; 7) Preventing some Negroes from vouching for any applicant; 8) Failing to issue certificates of registration to Negroes immediately upon the successful completion of the requirements of registration; 9) Failing to inform unsuccessful applicants of their failure to

The Commission on Civil Rights devotes some fourteen pages of its Report to examples of similar voting complaints.¹⁴ Enforcement of property, literacy, and other statutory qualifications against Negroes, but not against whites, is a common means of circumventing apparently legitimate voter qualification acts.¹⁵ The literacy test in particular has been described as "a fraud and nothing more" which is administered fairly only in exceptional cases.¹⁶ The following illustrations recount some of the more flagrant abuses of the literacy test. A North Carolina schoolteacher was asked to define certain terms in a section of the state constitution. The teacher responded that "This is not part of the law, to define terms"; to which the registrar replied, "You must satisfy me, and don't argue with me."¹⁷

In Alabama one of the questions asked a Negro applicant pursuant to the requirement for an applicant to "understand and explain" any clause of the Constitution was, "How many bubbles in a bar of soap?"¹⁸ Also in Alabama, these questions were put to Negroes requesting the right to vote: "What do we mean by the U.N.?" "How old are your wife's father and mother?" "Who is in charge of street improvements in Birmingham?"¹⁹ A registration official in Georgia went so far as to claim that "God, Himself, couldn't understand" a given constitutional provision as the official was the final judge and must be satisfied as to the correctness of the answer.²⁰

Mass purges of Negroes from the voting lists is another effective method of disfranchisement. In Washington Parish, Louisiana, during May, June, and July of 1959 all but roughly 200 of approximately 1500 Negro registrants were stricken from the rolls on the basis of challenges filed by members of the White Citizens' Council of that parish. The most common basis for these challenges was alleged errors in spelling on the application forms. White registrants whose applications contained similar errors were not challenged. Investigation revealed that the challengers, themselves, misspelled words when filling out the challenging affidavits.²¹

fulfill the requirements for registration; 10) Failing to work on many registration days; and 11) Resigning from the board in order not to register Negroes. 1960 Senate Hearings 194. See prayer for relief in *United States v. Alabama*, 171 F. Supp. 720 (M.D. Ala.), *aff'd*, 267 F.2d 808 (5th Cir. 1959), *vacated and remanded*, 362 U.S. 602, 188 F. Supp. 759 (M.D. Ala. 1960), as reproduced in 1960 Senate Hearings at 753-54.

¹⁴ Commission Report, ch. IV, "Denials of the Right to Vote," 55-68.

¹⁵ 1959 Senate Hearings, pt. 1, at 520. Compare Commission Report 130.

¹⁶ Key, *Southern Politics in State and Nation* 576 (1955).

¹⁷ Myrdal, *op. cit. supra*, note 8 at 485.

¹⁸ Verney, "The American Negro," 1 *Pol. Sci. Q.* 28 (1955).

¹⁹ Key, *op. cit. supra* note 16, at 572, n. 22.

²⁰ Myrdal, *op. cit. supra* note 8, at 485.

²¹ Commission Report 103-06. See *United States v. McElveen*, 177 F. Supp. 355

The use of violence to prevent Negroes from exercising the right to vote appears to be diminishing. Nonetheless, force is still employed on occasion and does serve as a very real deterrent to Negro registration and voting.²² In recent years a number of pro-segregation groups have appeared on the Southern scene, many of them loosely federated under the spiritual authority of the White Citizens' Council.²³ Initially these groups made no secret of the fact that their chief weapon would be economic pressure. One of the original leaders of the White Citizens' Council movement, Fred Jones, a former Mississippi State Senator, issued the following public statement in October, 1954:

We can accomplish our purposes largely with economic pressure in dealing with members of the Negro race who are not cooperating, and with members of the white race who fail to cooperate, we can apply social and political pressure.²⁴

Threats of injury and economic reprisal thus are commonplace. In a series of recent cases²⁵ the Justice Department is seeking to prevent eviction of various Negroes and their families from the Haywood County, Tennessee, farms where they lived and worked as sharecroppers and tenant farmers. The threatened evictions were allegedly to prevent and punish the Negroes for their attempts to register and to vote. Other threatening, intimidatory, and coercive devices charged to the defendants in these cases included:

the termination of non-farm employment, refusals by merchants and others to sell necessities and other goods and services on credit or even for cash in some instances, refusals to lend money to Negroes who were economically and otherwise eligible for such loans, inducing suppliers of Negro merchants not to deal with such merchants, etc.²⁶

(E.D. La. 1959), 180 F. Supp. 10 (E.D. La.), *aff'd, sub nom.* United States v. Thomas, 362 U.S. 58 (1960).

²² The beating administered a Negro who attempted to publish a placard urging Negroes to register and vote is related at Commission Report 96-97.

²³ Fleming, "Resistance Movements and Racial Desegregation," 304 *Annals* 44 (1956).

²⁴ Jackson (Miss.) Clarion Ledger, October 24, 1954.

²⁵ United States v. Beaty, Civil No. 4065, W.D. Tenn., January 3, 1961; United States v. Barcroft, Civil No. 4121, W.D. Tenn., January 3, 1961; United States v. Atkison, Civil No. 4131, W.D. Tenn., January 3, 1961. The former two cases, involving seventy-three individuals and two banks as defendants were appealed to the Sixth Circuit Court of Appeals on the Justice Department's request for *preliminary* relief against the threatened evictions. On April 6, 1961 district court Judge Marion S. Boyd was directed by the circuit court to grant a preliminary injunction against the landowners. United States v. Beaty, United States v. Barcroft, Civil Nos. 14433-34 (consolidated), 6th Cir., April 6, 1961. The New York Times, April 7, 1961, p. 17, col. 1.

²⁶ Brief for Appellant, p. 3, United States v. Beaty, United States v. Barcroft, Civil Nos. 14433-34 (consolidated), 6th Cir., April 6, 1961.

The Negro attempting to register often risks the loss of his job, credit, or business.²⁷

B. Past History

In the past several decades the various obstacles to Negro voting in the South have been under increasingly heavy legal attack. Despite the utterances of the Supreme Court that the fifteenth amendment nullifies "sophisticated as well as simple-minded modes of discrimination," the courts have succeeded with but limited success in effectuating the constitutional purpose.

1. The White Primary

The "white primary" had been securely established in Texas by virtue of party rules. In 1923 the State Legislature moved to bar Negroes from participation in Democratic Party primaries.²⁸ Upon review, the Supreme Court found it "hard to imagine a more direct and obvious infringement" of the fourteenth amendment.²⁹ As a result, the legislation was repealed and the State Executive Committee authorized to establish its own membership standards.³⁰ When the same individual was again denied the right to vote in a primary, the Supreme Court held that the Executive Committee, in excluding Negroes from membership, had acted as a delegate of the state.³¹ Its action was, therefore, held unconstitutional as a denial of equal protection of the laws by the state. By action of the state convention of the Democratic Party, another rule was adopted, allowing only whites to participate in the primaries. Seemingly persuaded by the holding of the Texas Supreme Court that political parties "are voluntary associations for political action and are not the creatures of the State,"³² the United States Supreme Court held that this action did not infringe the fourteenth amendment, as that amendment applied only to state action.³³

These early cases afforded no discernible test for the presence of state action necessary to constitute an abridgement of fourteenth

²⁷ The first sworn complaint received by the Commission on Civil Rights was of this nature. Commission Report 55. See *id.* at 58, 60, 64, 78; 1959 Senate Hearings, pt. 1, at 516, 522.

²⁸ 38th Leg., Second Called Session, Gen. Laws (1923), p. 74, Vernon's Texas Stat. art. 3093a, renumbered art. 3107 (1925).

²⁹ *Nixon v. Herndon*, 273 U.S. 536 (1927).

³⁰ 40th Leg., First Called Session, Laws (1927), p. 193, Vernon's Texas Stat. art. 3107 (1927).

³¹ *Nixon v. Condon*, 286 U.S. 73 (1932).

³² *Bell v. Hill*, 123 Tex. 531, 74 S.W.2d 113 (1934), cited in *Grove v. Townsend*, 295 U.S. 45, 51-52 (1935).

³³ *Grove v. Townsend*, *supra* note 32.

or fifteenth amendment rights. The case of *Smith v. Allwright*³⁴ expressly overruled *Grovey v. Townsend*, holding that when the privilege of party membership "is also the essential qualification for voting in a primary"³⁵ the actions of the party become actions of the state, proscribed by the fifteenth amendment. The eventual solution was provided in a case involving the prosecution by federal authorities of primary election officials in New Orleans.³⁶ The Court declared that the right to have one's vote counted where the primary was an "integral part" of the election machinery or where in fact the primary election "effectively controls the choice,"³⁷ is a right protected by article I, section 2 of the Constitution.

A final effort to resurrect the white primary was attempted by South Carolina. All relevant state statutes were repealed³⁸ and the party was left in complete control of the primary election. A sharply worded opinion in *Elmore v. Rice*³⁹ ridiculed this masquerade of the Democratic Party as a private club.⁴⁰ In the case of *Brown v. Baskin*,⁴¹ Negroes, though barred from party membership, were permitted to vote in the Democratic primary if they would take an oath to support racial segregation. This racial discrimination was held unconstitutional on the same rationale as in the *Elmore* case.

The final blow to the white primary system was struck by the Supreme Court's opinion in *Terry v. Adams*.⁴² Local candidates of the Jaybird Party, a self-declared "club," were initially chosen in a white primary. The successful local candidates were then chosen by the Democratic Party as its candidates in the regular primary. The Court held:

For a state to permit such a duplication of its election processes is to permit a flagrant abuse of these processes to defeat the purposes of the Fifteenth Amendment. The use of the county-operated primary to ratify the result of the prohibited election merely compounds the offense. It violates the Fifteenth Amendment for a state, by such circumvention, to permit within its borders the use

³⁴ 321 U.S. 649 (1944).

³⁵ *Id.* at 664.

³⁶ *United States v. Classic*, 313 U.S. 299 (1941).

³⁷ *Id.* at 318.

³⁸ In *Smith v. Allwright* certain state statutes did exist that could be linked to the primary election.

³⁹ 72 F. Supp. 516 (E.D. S.C.), *aff'd*, 162 F.2d 387 (4th Cir. 1947), *cert. denied*, 333 U.S. 875 (1948).

⁴⁰ 72 F. Supp. at 527: "... private clubs . . . do not vote and elect a President of the United States, and the Senators and members of the House of Representatives . . . ; and under the law of our land, all citizens are entitled to a voice in such selections."

⁴¹ 80 F. Supp. 1017 (E.D. S.C. 1948), *aff'd*, 174 F.2d 391 (4th Cir. 1949).

⁴² 345 U.S. 461 (1953).

of any device that produces an equivalent of the prohibited election.⁴³

The white primary as a device, intended to disfranchise the Negro citizen, is today virtually of historical importance alone.⁴⁴

2. The Poll Tax

There are now only five states that make the payment of a poll tax a prerequisite to voting.⁴⁵ The first appearance in the United States of tax payment as a qualification for voting was in colonial North Carolina. A statute of 1715 made payment of taxes a prerequisite.⁴⁶ During some part of the twentieth century thirteen states have required a poll tax as a prerequisite to voting in all elections.⁴⁷ Of the thirteen only two were northern states. Designed to disfranchise the Negro, in later years the tax operated to disfranchise poor whites as well. Realistically, it is only with respect to those individuals for whom the small payment is a hardship that the term disfranchisement is applicable. Considering the high percentage of persons of low economic levels in these states,⁴⁸ we may conclude that the number thus deterred from voting is undoubtedly considerable, although the number cannot be ascertained with precision.⁴⁹

In *Breedlove v. Suttles*⁵⁰ it was argued that a poll tax, as a qualification for voting in state or federal elections, is unlawful. The Court concluded that to make the payment of poll taxes a prerequisite of voting is not to deny any privilege or immunity protected by the fourteenth amendment. Later cases involving the poll tax have regarded the matter as conclusively determined by this decision.⁵¹

⁴³ *Id.* at 469.

⁴⁴ As recently as 1960, however, the Justice Department obtained a consent decree enjoining the conduct of a white primary by the Democratic Party in Fayette County, Tennessee. *United States v. Fayette County Democratic Executive Comm.*, Civil No. 3835, W.D. Tenn., April 25, 1960.

⁴⁵ The states and the annual rate of the tax are as follows: Alabama, \$1.50; Arkansas, \$1.00; Mississippi, \$2.00; Texas, \$1.50; and Virginia, \$1.50. The provisions of the respective state laws governing the poll tax and its administration are set out in Commission Report, Table I, 36-38.

⁴⁶ Compare North Carolina const., 1776, art. VIII.

⁴⁷ *McGovney, op. cit. supra* note 5, at 113.

⁴⁸ In 1958 the national average per capita income was \$2057. In the five poll tax states average per capita income was considerably lower: Alabama, \$1359; Arkansas, \$1228; Mississippi, \$1053; Texas, \$1814; and Virginia, \$1674. U.S. Bureau of the Census, *Statistical Abstract of the United States: 1960*, at 312 (1960).

⁴⁹ Key, *op. cit. supra* note 16, at 599.

⁵⁰ 302 U.S. 277 (1937).

⁵¹ *Pirtle v. Brown*, 118 F.2d 218 (6th Cir.), *cert. denied*, 314 U.S. 621 (1941); *Butler v. Thompson*, 97 F. Supp. 17 (E.D. Va.), *aff'd mem.*, 341 U.S. 937 (1951).

Numerous efforts to outlaw the tax by act of Congress have been made.⁵² Many of these bills have passed the House of Representatives only to die in the Senate as a result of committee inaction or senatorial filibuster. Thus the tax remains a potential device for racial discrimination in the suffrage area. As the impact of the tax lies more in its susceptibility to discriminatory application than in its apparent burden, its effect as a discriminatory device is difficult to evaluate. The record of the poll tax states in this respect is far from conclusive. While 25% of all voting age Negroes throughout the South were registered,⁵³ only 3.89% of the Negroes in Mississippi were registered,⁵⁴ while in Texas the comparable figure was 38.8%.⁵⁵ At present, however, it would seem that the danger posed by the poll tax rests more in its potential, than in its actual usage as a means of discrimination.

3. The Literacy Test

Nineteen states currently impose some form of literacy requirement as a qualification for voting, including all but three of the southern states.⁵⁶ Alabama requires that the applicant be able to read and write any article of the Constitution in English and to answer questions concerning his qualifications as an elector by filling out a questionnaire prescribed by the Alabama Supreme Court.⁵⁷ Georgia requires a demonstration by the applicant of an understanding of the duties and obligations of citizenship in addition to the ability to read and write English.⁵⁸ A 1954 amendment to the Mississippi constitution⁵⁹ sets forth the following requirements: ability to read and write any section of the state constitution, ability to give a reasonable interpretation thereof to the registrar, and the ability to demonstrate to the registrar a reasonable understanding of the duties and obligations of citizenship under a constitutional form of government. While the statutory tests in these and other states vary greatly, most contain a certain degree of ambiguity.

The Supreme Court has consistently held that a literacy test, fair

⁵² See, e.g., S. 1734, 82nd Cong., 1st Sess. (1951); H.R. 29, 80th Cong., 1st Sess. (1947); H.R. 7, 79th Cong., 1st Sess. (1945); H.R. 1024 and S. 1280, 77th Cong., 1st Sess. (1941).

⁵³ Commission Report 559-86, 587-89.

⁵⁴ *Id.* at 50.

⁵⁵ *Id.* at 51. Arkansas registered 28.1%, Virginia, 21.7% and Alabama, 14.1%. *Id.* at 42, 48-49. Among the non-poll tax states comparable figures ranged from 14.9% in South Carolina to 39.5% in Florida. *Id.* at 43, 47.

⁵⁶ Florida, Tennessee, and Texas.

⁵⁷ Ala. Code tit. 17, §§ 31, 32 (Supp. 1953).

⁵⁸ Ga. const. art. II, § 2-704.

⁵⁹ Miss. const. art. 12, § 244.

on its face and administered without prejudice, is valid.⁶⁰ The validity of the literacy test was indirectly challenged in the early case of *Williams v. Mississippi*.⁶¹ Since it did not on its face discriminate against Negro voters and there was no showing that it had been administered for this purpose, the test was held to be not in violation of the fourteenth amendment. In *Giles v. Harris*,⁶² the plaintiff alleged that the literacy test and other requirements of the Alabama Constitution⁶³ were part of a conspiracy to disfranchise the Negro and, therefore, violated the fourteenth and fifteenth amendments. Speaking for the Court, Mr. Justice Holmes held, *inter alia*, that the Court lacked power to enforce such relief and directed the plaintiff to look to the people of his state or to the legislature and political departments of the federal government.⁶⁴

Where the literacy test is made inapplicable to some groups, as by the addition of a "grandfather clause," its constitutionality will not be upheld. In 1915 such a clause first came before the Supreme Court. In *Guinn v. United States*⁶⁵ a unanimous Court struck down the Oklahoma statute as perpetuating "the very conditions which the [fifteenth] Amendment was intended to destroy."⁶⁶ The following year Oklahoma again sought to provide a loophole for the exemption of illiterate whites through a more "sophisticated" registration procedure. The new law provided that persons who had voted in the general election of 1914, held under the invalid "grandfather clause," were automatically registered for life. All other voters were required to register within a specified twelve day period or be permanently disfranchised. Noting that the amendment "nullifies sophisticated as well as simple-minded modes of discrimination,"⁶⁷ the Court held this registration scheme to be racial discrimination in violation of the fifteenth amendment.

More recently, Alabama sought to frustrate the *Smith v. Allwright*⁶⁸ decision by enactment of the "Boswell Amendment"⁶⁹ to the state constitution. This amendment provided that no one would be

⁶⁰ Emerson and Haber, 1 Political and Civil Rights in the United States 198-228 (2d ed. 1958).

⁶¹ 170 U.S. 213 (1898). See Corwin, The Constitution of the United States, Analysis and Interpretation 1185-86 (1953).

⁶² 189 U.S. 475 (1903).

⁶³ Ala. const. art. 8, §§ 180-88 (1901).

⁶⁴ 189 U.S. at 488.

⁶⁵ 238 U.S. 347 (1915). See Corwin, *op. cit. supra* note 61, at 1184.

⁶⁶ 238 U.S. at 360.

⁶⁷ Lane v. Wilson, 307 U.S. 268, 275 (1939).

⁶⁸ 321 U.S. 649 (1944).

⁶⁹ Ala. const. amend. No. 55 (1946).

registered as a voter unless he had the ability to "understand and explain" any clause of the Constitution of the United States to the satisfaction of the board of registrars. This method of disfranchisement was held violative of the fifteenth amendment because of the grant of arbitrary powers to the election board.⁷⁰

Despite these decisions, the literacy test remains a major source of discrimination in the realm of Negro suffrage.⁷¹ A literacy test, fair on its face *and not prone to discrimination in its administration*, is valid as a qualification which the state may impose on the prospective voter. But the ambiguity inherent in many of these tests renders them highly susceptible to subtle and not so subtle discrimination. For example, a questionnaire prepared by the Alabama Supreme Court requires the applicant to "name some of the duties and obligations of citizenship," and asks "Do you regard those duties and obligations as having priority over the duties and obligations you owe to any other secular organization when they are in conflict?"⁷² Despite the fact that the Supreme Court has long been unwilling or unable to define the term,⁷³ a Georgia statute demands of applicants, "What is a republican form of government?"⁷⁴

II. FEDERAL LEGISLATION TO SAFEGUARD VOTING RIGHTS

A. *Constitutional Bases*

Any federal legislation affecting voting rights must find its source in the Constitution. Article I, section 2⁷⁵ and the seventeenth amendment⁷⁶ stipulate that those electors who are qualified to vote for the largest body of the state legislature shall elect the Representatives and Senators to Congress. Despite the right of the states to establish reasonable restrictions on the right to vote, the Supreme Court has

⁷⁰ Davis v. Schnell, 81 F. Supp. 872 (S.D. Ala.), *aff'd mem.*, 336 U.S. 933 (1949).

⁷¹ The Southern Regional Council's report concludes that "[t]he legal weapon most widely used in the South to discourage Negro registration is some form of literacy or constitutional interpretation test." Price, *The Negro Voter in the South* 7 (1957).

⁷² See "Hearings on H.R. 140 *et al.*, Before Subcommittee No. 5 of the House Committee on the Judiciary," 85th Cong., 1st Sess. 906-08 (1957); Note, 4 Ala. L. Rev. 317 (1952).

⁷³ See, e.g., Luther v. Borden, 48 U.S. (7 How.) 1 (1849).

⁷⁴ Ga. Code Ann. § 34-118 (Supp. 1958).

⁷⁵ U.S. Const. art. I, § 2 provides: The House of Representatives shall be composed of Members chosen every Second Year by The People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

⁷⁶ U.S. Const. amend. XVII provides for election of Senators by the people qualified to vote for members of the most numerous branch of the state legislature, modifying article I, § 3.

held that the right of the people to vote for these offices stems from the federal constitution.⁷⁷

Another fundamental source of federal power, article I, section 4 provides:

The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of Chusing Senators.⁷⁸

Although doubts may be expressed as to the extent of power thus granted,⁷⁹ the Supreme Court has suggested that Congress has the power

to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns; in short, to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved.⁸⁰

Congress may prohibit state and private acts of interference in presidential as well as in congressional elections.⁸¹ This power includes control over all phases of the political process leading to these elections.⁸²

The fourteenth, fifteenth and nineteenth amendments impose limitations on both the United States and the individual states in the execution of voting laws.⁸³ The nineteenth amendment proscribes the denial or abridgement of voting rights because of sex. The fourteenth amendment, in part, prohibits the states from abridging the privileges or immunities of citizens of the United States⁸⁴ or denying to any

⁷⁷ *United States v. Saylor*, 322 U.S. 385 (1944) (Senator); *United States v. Classic*, 313 U.S. 299, 314-15 (1941) (Representative); *United States v. Mosley*, 238 U.S. 383 (1915) (Representative); *Wiley v. Sinkler*, 179 U.S. 58, 62-64 (1900) (Representative); *Ex parte Yarbrough*, 110 U.S. 651, 663-64 (1884) (Representative).

⁷⁸ U.S. Const. art. I, § 4.

⁷⁹ Compare 106 Cong. Rec. 3550 (daily ed. Feb. 29, 1960) (remarks of Senator Robertson) and 1960 Senate Hearings, 139-40 (statement of Senator Stennis), with *id.* at 57 (statement of Senator Javits).

⁸⁰ *Smiley v. Holm*, 285 U.S. 355, 366 (1932).

⁸¹ *Burroughs v. United States*, 290 U.S. 534 (1934); *Ex parte Yarbrough*, 110 U.S. 651 (1884).

⁸² *United States v. Classic*, 313 U.S. 299 (1941), allowed control over the primary election.

⁸³ *McGovney*, *op. cit. supra* note 5, at 4.

⁸⁴ Dictum in *Twining v. New Jersey*, 211 U.S. 78, 97 (1908), suggests that these privileges and immunities include the right to vote for national officers.

person the equal protection of the law.⁸⁵ The fifteenth amendment expressly prohibits both the United States and the states from denying a citizen the right to vote "on account of race, color, or previous condition of servitude." The fourteenth and fifteenth amendments have always been interpreted as applicable only to the prevention of discriminatory "state action" and not to discriminatory conduct by individuals acting free of state authority.⁸⁶

Congress is vested with the power to enforce the provisions of these amendments by "appropriate legislation." The scope of the foregoing term for purpose of the amendments is fairly broad. Any means not specifically prohibited by the Constitution appears to satisfy the standard.⁸⁷ So long as the means chosen are not prohibited by the Constitution and bear a legitimate relationship with the ends in view, the legislation will be "appropriate."⁸⁸

B. Reconstruction Legislation

On April 9, 1866, Congress passed over President Johnson's veto the first of five civil rights statutes that were to stand as the bulwark of the Reconstruction legislation.⁸⁹ The initial act provided that all citizens, without regard to color, were entitled to the same rights to contract, sue, give evidence, take, hold and convey property, and to the equal benefit of all laws for the security of persons and property.⁹⁰ Subsequent to passage of the fourteenth⁹¹ and fifteenth⁹² amendments, the Congress reenacted the act of 1866 and endeavored to protect the right of free suffrage without discrimination as to race, color or previous

⁸⁵ This clause afforded the basis of relief in two early "white primary" cases considered previously. *Nixon v. Condon*, 286 U.S. 73 (1932); *Nixon v. Herndon*, 271 U.S. 536 (1927).

⁸⁶ *E.g.*, *United States v. Cruikshank*, 92 U.S. 542 (1875).

⁸⁷ *Ex parte Virginia*, 100 U.S. 339, 345-46 (1880). The Civil Rights Act of 1957 has recently been declared "appropriate legislation" to enforce the fifteenth amendment. *In re Wallace*, 170 F. Supp. 63 (M.D. Ala. 1959); *United States v. McElveen*, 177 F. Supp. 355 (E.D. La. 1959), 180 F. Supp. 10 (E.D. La.), *aff'd, sub nom. United States v. Thomas*, 362 U.S. 58 (1960).

⁸⁸ In cases holding the Civil Rights Act of 1870 unconstitutional, however, the Supreme Court objected to the "ends," *i.e.*, the purposes of the statute, rather than the "means" employed to reach those "ends." *James v. Bowman*, 190 U.S. 127 (1903); *United States v. Reese*, 92 U.S. 214 (1876); *Minor v. Happersett*, 88 U.S. (21 Wall.) 162 (1875); Compare *United States v. Raines*, 172 F. Supp. 552 (M.D. Ga. 1959) (holding 71 Stat. 637 [1957], 42 U.S.C. § 1971[c] [1958] invalid on similar grounds), *rev'd*, 362 U.S. 17, 189 F. Supp. 121 (M.D. Ga. 1960).

⁸⁹ The full text of these civil rights laws appears in Carr, *Federal Protection of Civil Rights: Quest for a Sword*, App. I (1947).

⁹⁰ Act of April 9, 1866, 14 Stat. 27.

⁹¹ U.S. Const. amend. XIV, adopted June 16, 1866, and ratified July 21, 1868.

⁹² U.S. Const. amend. XV, adopted February 26, 1869, and ratified March 30, 1870.

condition of servitude.⁹³ The following year supplemental legislation was enacted which gave further effect to the voting provisions of the earlier act by providing for the regulation of elections by "voting supervisors" to be appointed thereunder.⁹⁴ In April of 1871 penalties were established for depriving any person of the equal protection of the laws, or the privileges and immunities of the law by conspiracy or under color of law.⁹⁵ An act which required all inns, public conveyances, and other places of public amusement to accommodate all persons, subject only to such conditions as were applicable to citizens of every race and color,⁹⁶ constituted the last congressional legislation in the civil rights area for a period of 82 years.

Intended to secure a status of equality to the Negro, these early acts were largely deemed a failure.⁹⁷ Their lack of success is in some measure attributable to judicial invalidation and congressional inaction, both of which conspired to nullify their desired effect. Even so, these acts remain as the wellspring of certain of the currently available remedies in the suffrage area.

C. Current Remedies

Several sections of the Reconstruction legislation have survived to afford current protection of civil rights generally and voting rights in particular. In addition to those sections which proclaim rights but carry no remedial sanctions,⁹⁸ this legislation is readily divided between that which creates remedies in the form of civil causes of action and that which imposes criminal sanctions. This legislation has now been supplemented by the Civil Rights Acts of 1957⁹⁹ and 1960.¹⁰⁰

⁹³ Act of May 31, 1870, 16 Stat. 140.

⁹⁴ Act of February 28, 1871, 16 Stat. 433.

⁹⁵ Act of April 20, 1871, 17 Stat. 13.

⁹⁶ Act of March 1, 1875, 18 Stat. 335.

⁹⁷ Report of the President's Committee on Civil Rights: To Secure These Rights (1947).

⁹⁸ Rev. Stat. § 2004 (1875), 42 U.S.C. § 1971(a) (1958); Rev. Stat. § 1977 (1875), 42 U.S.C. § 1981 (1958); Rev. Stat. § 1978 (1875), 42 U.S.C. § 1982 (1958). 42 U.S.C. § 1971(a) is derived from the Act of May 31, 1870, ch. 114, § 1, 16 Stat. 140; § 1981 from the Act of May 31, 1870, ch. 114, § 16, 16 Stat. 144; § 1982 from the Act of April 9, 1866, ch. 31, § 1, 14 Stat. 27. These three sections merely declare the existence of equality without distinction as to race, color, or previous condition of servitude in such matters as voting, owning property, ability to sue, give evidence, contract, etc.

⁹⁹ 71 Stat. 634-38 (1957), 5 U.S.C. § 295-1 (1958), 28 U.S.C. §§ 1343, 1861 (1958), 42 U.S.C. §§ 1971, 1975, 1995 (1958).

¹⁰⁰ P. L. 86-449, approved May 6, 1960, 74 Stat. 86 (1960), 18 U.S.C.A. §§ 837, 1074, 1509 (Supp. 1960), 20 U.S.C.A. §§ 241, 640 (Supp. 1960), 42 U.S.C.A. §§ 1971, 1974, 1975 (Supp. 1960).

1. Civil Suits

Private civil actions under section 1983¹⁰¹ of the Civil Rights Act may be instituted against persons who act "under color of any statute" to deprive another of any rights, privileges or immunities protected or secured by the Constitution or laws of the United States. Persons guilty of such action shall be liable to the party injured in an action at law or in a suit in equity.¹⁰² Protected here is the right of all qualified persons to vote in federal elections as well as the right not to be the subject of state-imposed racial discrimination in any election. Suits against registration officials for discrimination based on race are countenanced, and, to this extent at least, the section is constitutional.¹⁰³ Recent application of this section by the Supreme Court invests the act with greater vitality than the lower courts have accorded it in recent years.¹⁰⁴

Section 1985¹⁰⁵ affords similar causes of action for conspiracy to interfere with or deprive a person of his federal rights. However, this section was rendered practically useless by the Supreme Court's decision in *Collins v. Hardyman*.¹⁰⁶

Section 1986¹⁰⁷ allows a similar civil recovery against those who, having the power to prevent the commission of such acts, refuse or neglect to do so.

2. Criminal Sanctions

The two relevant criminal statutes are 18 U.S.C., sections 241¹⁰⁸

¹⁰¹ Rev. Stat. § 1979 (1875), 42 U.S.C. § 1983 (1958) (derived from the Act of April 20, 1871, ch. 22, § 1, 17 Stat. 13).

¹⁰² "Every person, who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." Rev. Stat. § 1979 (1875), 42 U.S.C. § 1983 (1958).

¹⁰³ *Lane v. Wilson*, 307 U.S. 268 (1939); *Myers v. Anderson*, 238 U.S. 368 (1915); *Elmore v. Rice*, 72 F. Supp. 516 (E.D. S.C.), *aff'd*, 165 F.2d 387 (4th Cir. 1947), *cert. denied*, 333 U.S. 875 (1948).

¹⁰⁴ *Monroe v. Pape*, 365 U.S. 167 (1961). Chicago police officers were held liable to the aggrieved party under § 1983 for acts constituting an unreasonable search and seizure.

¹⁰⁵ Rev. Stat. § 1980 (1875), 42 U.S.C. § 1985(3) (1958) (derived from the Act of April 20, 1871, ch. 22, § 2, 17 Stat. 13).

¹⁰⁶ 341 U.S. 651 (1951).

¹⁰⁷ Rev. Stat. § 1981 (1875), 42 U.S.C. § 1986 (1958) (derived from the Act of April 20, 1871, ch. 22, § 6, 17 Stat. 15).

¹⁰⁸ 62 Stat. 696 (1948), 18 U.S.C. § 241 (1958): If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or

and 242.¹⁰⁹ Section 241 is directed against individuals without regard to their possible official capacity. It is immaterial that the defendant in a section 241 suit may be a state official; the fact that he is would not enlarge the rights of the complainant protected by the section.¹¹⁰

The scope of protection afforded by this section includes only those rights "secured by the Constitution and federal laws." This clearly encompasses those rights created directly by the Constitution or by Congress in the exercise of its substantive powers.¹¹¹ It is still doubtful, however, whether the federally protected rights guaranteed against state actions by the fourteenth amendment's due process and equal protection clauses are incorporated into this section, even though the individuals involved had been acting under color of state laws. This issue confronted the Supreme Court in *United States v. Williams*.¹¹² The Court divided evenly, four to four, on the question. Consequently, it would appear that the section is applicable only to state election officials who obstruct the registration of qualified Negroes to vote in *federal* elections. This result follows because the right to vote in a federal election arises from the citizen's relationship with the federal government, while the right to be free from discrimination in *any* election is a right merely protected from state interference by the fifteenth amendment.¹¹³

Section 242, like 42 U.S.C., section 1983, concerns action under color of law where either federally secured or protected rights are involved. The effectiveness of the protection under section 242 is limited by the requirement that the action be willful.¹¹⁴

If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured—

They shall be fined not more than \$5,000 or imprisoned not more than 10 years, or both.

¹⁰⁹ 62 Stat. 696 (1948), 18 U.S.C. § 242 (1958): Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than \$1000 or imprisoned not more than one year, or both.

¹¹⁰ *United States v. Williams*, 341 U.S. 70 (1951).

¹¹¹ *E.g.*, *United States v. Classic*, 313 U.S. 299 (1941) (right to vote in and to have one's vote counted in a federal election).

¹¹² 341 U.S. 70 (1951). The defendants, acting under color of law, had obtained confessions by the use of force and were indicted under § 241 for having interfered with a right arising under the due process clause of the fourteenth amendment.

¹¹³ See Note, 3 Race Rel. L. Rep. 133, 145-46 (1958).

¹¹⁴ It was by a strict interpretation of the requirement of willful action that the Supreme Court warded off an attack on § 242 because of vagueness in *Screws v. United*

It would seem clear that the rights given under the due process, equal protection, and privileges and immunities clauses of the fourteenth amendment,¹¹⁵ as well as those rights given by national citizenship and federal laws,¹¹⁶ can be protected under this section, as under its civil counterpart, section 1983. Section 242 thus proscribes discriminatory application of voting criteria by state election officials in both state and federal elections.

3. The Civil Rights Act of 1957

The Civil Rights Act of 1957 consists, in essence, of four main provisions: 1) the creation of a Civil Rights Commission,¹¹⁷ 2) the addition of an Assistant Attorney General,¹¹⁸ 3) further protection of voting rights,¹¹⁹ and 4) the establishment of a limited right to trial by jury in cases of criminal contempt arising out of conduct prohibited by the act.¹²⁰

Section 1971 provides that all citizens otherwise qualified to vote "shall be entitled and allowed to vote" in any election without regard to "race, color, or previous condition of servitude."¹²¹ This declaration of right is implemented by subsection (c) of section 1971 which permits the Attorney General to institute a suit for preventive relief whenever any person has engaged or is about to engage in any act or

States, 325 U.S. 91 (1945). *But see* Clark v. United States, 193 F.2d 294 (5th Cir. 1951); Koehler v. United States, 189 F.2d 711 (5th Cir. 1951); and Crews v. United States, 160 F.2d 746 (5th Cir. 1947). In the recent case of Monroe v. Pape, 365 U.S. 167, 207 (1961), Mr. Justice Frankfurter remarks that "even in the criminal area, the specific intent demanded by Screws has proved to be an abstraction serving the purposes of a constitutional need without impressing any actual restrictions upon the nature of the crime which the jury tries."

¹¹⁵ Terry v. Adams, 345 U.S. 461 (1953); Lane v. Wilson, 307 U.S. 268 (1939); Guinn v. United States, 238 U.S. 347 (1915); and United States v. Reese, 92 U.S. 214 (1876), establish the proposition that "rights, privileges or immunities secured by the Constitution" include the rights of qualified persons to vote in *any* election free from discrimination imposed under color of state law.

¹¹⁶ United States v. Classic, 313 U.S. 299 (1941), makes it clear that the right of qualified voters to cast their ballots for federal officials is secured by the Constitution, and that a willful denial of this right by state election officials is punishable under the section.

¹¹⁷ 71 Stat. 634 (1957), 42 U.S.C. §§ 1975-1975c (1958).

¹¹⁸ 71 Stat. 637 (1957), 5 U.S.C. § 295-1 (1958).

¹¹⁹ 71 Stat. 637 (1957), 42 U.S.C. §§ 1971(b)-(e) (1958).

¹²⁰ 71 Stat. 638 (1957), 28 U.S.C. § 1861 (1958).

¹²¹ 71 Stat. 637 (1957), 42 U.S.C. § 1971(a) (1958), amending Rev. Stat. § 2004 (1875). Section 1971 as originally enacted was designed to implement the fifteenth amendment. Cast in the form of a mere declaration of right, the original section carried no sanction but relied for enforcement upon the criminal and civil remedies discussed previously.

practice which could be contrary to any person's right under the initial subsection.¹²²

The initiation of injunctive suits by the Attorney General requires neither the consent of the individual whose rights are to be vindicated¹²³ nor the exhaustion of whatever judicial or administrative remedies a state may require.¹²⁴ Although prior statutes did not expressly require the exhaustion of state judicial remedies in suffrage cases,¹²⁵ federal courts usually refused to review decisions of state administrative officials without a showing to that effect.¹²⁶ Temporary relief may now be granted before election day has passed. Adjudication of the constitutionality of state statutes under which the right to vote is denied may be obtained more promptly.¹²⁷

Persons disobeying such injunctions are subject to contempt proceedings without a jury. However, the defendant may demand a trial *de novo* in a criminal contempt proceeding when the judge imposes a fine in excess of \$300 or imprisonment of longer than forty-five days. Contempt committed in the presence of the court or by an officer of the court may be punished without affording the defendant a jury trial.¹²⁸

The constitutionality of section 1971 was brought under attack in *United States v. Raines*¹²⁹ and in *United States v. McElveen*.¹³⁰ Although the former case was brought against state election officials, it was argued that the section could also be employed to punish private individuals for interfering with the rights of prospective Negro voters in state and local elections. Reasoning that Congress had only the power to regulate federal elections and to prohibit state action that denied individuals the right to vote on discriminatory grounds, the district court dismissed the action on the ground that the statute was unconstitutional. The district court in the latter case upheld the con-

¹²² See generally, Comment, 43 Cornell L. Q. 661 (1958); Note, 71 Harv. L. Rev. 573 (1958).

¹²³ H.R. Rep. No. 291, 85th Cong., 1st Sess. 55 (1957); H.R. Rep. No. 2187, 74th Cong., 2d Sess. 19, 78 (1956).

¹²⁴ 71 Stat. 637 (1957), 42 U.S.C. § 1971(d) (1958).

¹²⁵ Originally it had been held, in at least one case, that the plaintiffs must exhaust all state *administrative and judicial* remedies. *Trudeau v. Barnes*, 65 F.2d 563 (5th Cir.), *cert. denied*, 290 U.S. 659 (1933). Later the courts generally accepted the position that it was not necessary to exhaust state judicial remedies. *Lane v. Wilson*, 307 U.S. 268 (1939).

¹²⁶ *E.g.*, *Peay v. Cox*, 190 F.2d 123 (5th Cir.), *cert. denied*, 342 U.S. 896 (1951).

¹²⁷ H.R. Rep. No. 291, 85th Cong., 1st Sess. 10-11 (1957).

¹²⁸ 71 Stat. 638 (1957), 28 U.S.C. § 1861 (1958).

¹²⁹ 172 F. Supp. 552 (M.D. Ga. 1959), *rev'd*, 362 U.S. 17, 189 F. Supp. 121 (M.D. Ga. 1960).

¹³⁰ 177 F. Supp. 355 (E.D. La. 1959), 180 F. Supp. 10 (E.D. La. 1960), *aff'd, sub nom.* *United States v. Thomas*, 362 U.S. 531 (1960).

stitutionality of the section as applied to the actions of state officials and others acting under color of state law.

Relying on the familiar rule that precludes consideration of constitutional issues not necessary under the facts presented by the case, the Supreme Court affirmed *McElveen*¹³¹ and reversed the *Raines* decision.¹³² These decisions thus affirm the constitutionality of section 1971 as applied to discriminatory treatment by registration officials.

4. The Civil Rights Act of 1960

Title VI of the 1960 act¹³³ provides that the Attorney General shall first bring a civil suit under section 1971 of the 1957 Civil Rights Act to protect the Negroes' right to vote. If such suit is successful, he can then ask the court to hold another adversary proceeding and make a separate finding that there was a "pattern or practice" of depriving Negroes in the area involved in the suit of their right to vote. When a court finds such a "pattern or practice," any Negro living in the area may apply to the court to issue an order declaring him qualified to vote if he is able to prove: 1) that he was qualified to vote under state law; 2) that he had tried to register after the "pattern or practice" finding; and 3) that he had not been allowed to register or had been found unqualified by someone acting under color of state law.¹³⁴ The court must hear the Negro's application within ten days. Notification of the order, which is effective for a period as long as that for which the applicant would have been qualified to vote if registered under state law, is communicated to the appropriate state officials. Failure to comply subjects the official in question to contempt proceedings.

To effectuate the act, the court may appoint one or more voting referees,¹³⁵ who must themselves be qualified voters in the judicial

¹³¹ *Sub nom.* United States v. Thomas, 362 U.S. 58 (1960).

¹³² 362 U.S. 17 (1960).

¹³³ 74 Stat. 90 (1960), 42 U.S.C.A. § 1971(e) (Supp. 1960).

¹³⁴ In United States v. Ass'n of Citizen's Councils, Civil No. 7881, W.D. La., the Justice Department is seeking a determination by the district court that a pattern or practice of discrimination in voting registration exists. Appointment of a referee is being sought. Although the case was tried in November, 1960, no decision has been rendered as of this writing. For an earlier opinion in the case, see 187 F. Supp. 846 (W.D. La. 1960). The Justice Department has also taken steps, without public announcement, toward naming of a referee in Terrell County, Georgia, but has thus far been unsuccessful. United States v. Raines, Civil No. 442, M.D. Ga., January 24, 1961. See The New York Times, June 8, 1960, p. 1, col. 8.

¹³⁵ The referees would have the powers conferred on court masters by Rule 53(c) of the Federal Rules of Civil Procedure to subpoena records, administer oaths, and cross examine witnesses.

district. Proceedings before the referees are intended to be simple. The referee must take the Negro's application and proof in an ex parte proceeding. The referee must then report to the district court stating whether or not the applicant is qualified to vote and whether or not he has been denied the right to vote by state officials. Upon a finding favorable to the applicant, the district court will then order the Attorney General to transmit a show-cause order returnable within ten days to state election officials who may challenge the referee's report.

Either the court or the referee may decide the challenges in accordance with court-directed procedures. Challenges on points of law must be accompanied by a legal memorandum; challenges on points of fact must be accompanied by a verified copy of a public record or an affidavit by those with personal knowledge of the controverting evidence. The referee's report is determinative in issues of the applicant's literacy. If the court determines that the applicant is qualified, it issues to him a certificate stating his eligibility. Provisional orders may be issued to enable an applicant to vote pending determination of his application.¹³⁶

In any suit instituted under these provisions, the state would be held responsible for the actions of its officials and, in the event state officials resign and are not replaced, the state itself could be sued.¹³⁷

The 1960 act appears to be a clearly constitutional exercise of congressional power to regulate federal elections.¹³⁸ Since eligible candidates are qualified to vote only after the district court has determined that they have been discriminatorily denied the right to register or to vote by state action, the act seems to constitute "appropriate legislation" for the implementation of the fifteenth amendment, insofar as state and local elections are affected.¹³⁹

¹³⁶ If a Negro has applied for a court certificate twenty or more days prior to the election and such application has not been determined by election day, the court must allow him to vote provisionally, and impound his ballot pending a decision on his application. If he applies within twenty days of the election, the court has the option of whether or not to let him vote.

¹³⁷ Section 601(b), 74 Stat. 86 (1960), 42 U.S.C.A. § 1971(c) (Supp. 1960). How this section is to be enforced is not altogether clear. Moreover, in *United States v. Alabama*, 362 U.S. 602 (1960), the Supreme Court vacated the dismissal by the district court (267 F.2d 808) and remanded for further proceedings. In so doing the Court did not express any view upon the constitutionality of this section, thus leaving the issue open for subsequent determination. 362 U.S. at 604.

¹³⁸ See text *supra* at notes 75-82.

¹³⁹ *Ibid.*

III. CONTINUED OBSTACLES TO NEGRO VOTING

A. *Limited Coverage of Existing Legislation*

The catalogue of civil and criminal remedies related above would afford less than complete protection of suffrage rights even if they were not further impeded by practical difficulties.

The civil sanctions, which seek to protect voting rights from infringement, are limited in their application to instances involving conspiracies or state action.¹⁴⁰ The criminal penalties that can be assessed against persons who intimidate others in the exercise of their voting rights purport to apply to any election.¹⁴¹ Primary elections or conventions of a political party, however, are excluded by definition.¹⁴² Thus only when section 1971, which does include primaries, is combined with the criminal sanctions imposed by sections 241 and 242 can prosecuting authorities reach proscribed election activities which occur in a primary election. As suggested earlier, these sections are limited to the political machinery attendant upon federal elections or to action under color of state law.¹⁴³ The Civil Rights Acts of 1957 and 1960 are similarly limited; on their face, they appear to extend only to interference by state action and not to acts of private discrimination. By judicial construction, their scope seems destined to remain thus limited.¹⁴⁴

B. *Reluctance to Prosecute*

The process of judicial enforcement of suffrage rights involves a number of inherent defects. The method of litigation as a remedy for discrimination in the voting rights field is considerably less than a panacea. Initially, many Negroes will be deterred from invoking these remedies by the fear of economic or physical retaliation.¹⁴⁵ Although the 1957 act does not require the consent of the individual whose rights are to be vindicated as a prerequisite to the initiation of injunctive suits by the Attorney General,¹⁴⁶ the Justice Department is naturally reluctant to begin proceedings without a willing com-

¹⁴⁰ Rev. Stat. §§ 1979-81 (1875), 42 U.S.C. §§ 1983, 1985-86 (1958).

¹⁴¹ 62 Stat. 720 (1948), 18 U.S.C. § 594 (1958).

¹⁴² 62 Stat. 719 (1948) as amended, 18 U.S.C. § 591 (1958), sets forth definitions governing that part of the criminal code dealing with elections.

¹⁴³ See text *supra* at notes 101-16.

¹⁴⁴ *United States v. Raines*, 172 F. Supp. 552 (M.D. Ga. 1959), *rev'd*, 362 U.S. 17, 189 F. Supp. 121 (M.D. Ga. 1960); *United States v. McElveen*, 177 F. Supp. 355 (E.D. La. 1959), 180 F. Supp. 10 (E.D. La.), *aff'd, sub nom. United States v. Thomas*, 362 U.S. 58 (1960).

¹⁴⁵ See 103 Cong. Rec. 9800 (daily ed. July 8, 1957).

¹⁴⁶ H.R. Rep. No. 291, 85th Cong., 1st Sess. 55 (1957). Objections to this "novel" idea are voiced in H.R. Rep. No. 2187, 84th Cong., 2d Sess. 25 (1956).

plainant.¹⁴⁷ The Justice Department also entertains a fear of hardening resistance if litigation is pushed in areas where feeling is strong against the federal government.¹⁴⁸ The 1960 act requires the individual complainant to claim discriminatory treatment at the hands of election officials and to request that the United States bring suit under section 1971(c).¹⁴⁹ Thus Negroes, to invoke the remedy of the act, must bring publicized charges against local public officials, thereby identifying the complainant as a target for coercion and intimidation.¹⁵⁰ Other Negroes who would avail themselves of a determination that a pattern of discrimination existed, must identify themselves to registration officials, and then to a referee and a district court. As the act contemplates an open hearing at some point, the complainants' names cannot remain secret.

The ultimate disposition of the *Haywood County* cases may well provide the most significant development yet achieved under the 1957 act. The Sixth Circuit Court of Appeals ordered a preliminary injunction against nearly seventy defendants based on evidence of threats, intimidation, and coercion.¹⁵¹ Violation of the restraining order would subject the offenders to punishment for contempt of court. Such a sanction may go far in alleviating, if not eliminating, some of the practical difficulties inherent in the judicial enforcement of suffrage rights.

The civil remedies present an additional difficulty. It is doubtful that many individual Negroes can find the necessary resources required to support such litigation. Even those individuals with sufficient financial resources are unlikely to institute lengthy and costly litigation merely to secure their franchise. The lower federal courts have thus far been unwilling to permit class suits as a solution to this dilemma.¹⁵²

¹⁴⁷ However, Clarence Mitchell, an NAACP director, testified that the government's failure to act was due not to an absence of complaints, but rather to an administrative decision not to bring suit unless victory was certain. 1959 Senate Hearings, pt. 1, at 295-96.

¹⁴⁸ 1959 Senate Hearings, pt. 1, at 223 (testimony of Attorney General Rogers).

¹⁴⁹ 74 Stat. 90 (1960), 42 U.S.C.A. § 1971(c) (Supp. 1960).

¹⁵⁰ In addition to the *Haywood County* cases, *supra* note 25, see *United States v. Deal*, Civil No. 8132, W.D. La., in which eleven individuals and eleven corporations were charged with a violation of § 1971(b) by refusing to gin cotton for a Negro farmer after he had testified at the New Orleans hearing of the Commission on Civil Rights regarding his unsuccessful efforts to register and vote. The case has been continued indefinitely by stipulation of the parties.

¹⁵¹ The New York Times, April 7, 1961, p. 17, col. 1. *Supra* note 25.

¹⁵² Compare *Reddix v. Lucky*, 252 F.2d 930 (5th Cir. 1958), with *Sharp v. Lucky*, 252 F.2d 910 (5th Cir. 1958).

C. Difficulty of Locating Defendants

Once the initial reluctance to institute proceedings is overcome, there yet remains the difficulty of locating the appropriate defendant. In the case of *United States v. McElveen*,¹⁵³ Judge Wright notes that the registrar is an indispensable party to the granting of relief under section 1971(c).¹⁵⁴ Much publicity attends the efforts by the Civil Rights Commission or the FBI to secure evidence of voting rights discrimination.¹⁵⁵ Registrars are consequently forewarned that a suit is to be instituted and may resign their office, thereby avoiding the litigation.

In *United States v. Alabama*¹⁵⁶ registrars Livingston and Rogers submitted their resignations during a controversy with the Civil Rights Commission.¹⁵⁷ Two months later the Justice Department filed suit to force the registration of qualified Negroes in Macon County. The district court held¹⁵⁸ that the 1957 act did not authorize suits against impersonal entities such as the Board of Registrars or the State of Alabama and therefore dismissed the action. The court of appeals affirmed this disposition.¹⁵⁹

Confronted with this judicial construction of the 1957 act, the administration proposed,¹⁶⁰ and Congress adopted, a provision in the 1960 act authorizing suit against a state as a party defendant when the state registrars resign.¹⁶¹ *United States v. Alabama*¹⁶² was heard

¹⁵³ 177 F. Supp. 355 (E.D. La. 1959), 180 F. Supp. 10 (E.D. La.), *aff'd*, *sub nom.* *United States v. Thomas*, 362 U.S. 58 (1960).

¹⁵⁴ 177 F. Supp. at 357, citing *Williams v. Fanning*, 332 U.S. 490 (1947).

¹⁵⁵ Referring to the Montgomery, Alabama hearing by the Commission on December 8, 1958, the Commission Report notes that "two dozen newsmen sat at the press tables, and four television cameras whirled quietly in the rear." Commission Report 75.

¹⁵⁶ 171 F. Supp. 720 (M.D. Ala.) *aff'd*, 267 F.2d 808 (5th Cir. 1959), *vacated and remanded*, 362 U.S. 602, 188 F. Supp. 759 (M.D. Ala. 1960).

¹⁵⁷ Commission Report 69-97.

¹⁵⁸ 171 F. Supp. 720 (M.D. Ala.), *aff'd*, 267 F.2d 808 (5th Cir. 1959), *vacated and remanded*, 362 U.S. 602, 188 F. Supp. 759 (M.D. Ala. 1960).

¹⁵⁹ 267 F.2d 808 (5th Cir. 1959), *vacated and remanded*, 362 U.S. 602, 188 F. Supp. 759 (M.D. Ala. 1960).

¹⁶⁰ The administration submitted an original and revised version of its proposal. The original proposal is contained in a number of bills introduced in both Houses of Congress. H.R. 10018, 86th Cong., 2d Sess. (Jan. 28, 1960, Congressman Goodell); H.R. 10034, 86th Cong., 2d Sess. (Jan. 28, 1960, Congressman Lindsay); H.R. 10035, 86th Cong., 2d Sess. (Jan. 28, 1960, Congressman McCulloch); S. 3001, 86th Cong., 2d Sess. (Feb. 8, 1960, Senator Dirksen).

¹⁶¹ Section 601(b), 74 Stat. 86 (1960), 42 U.S.C.A. § 1971(c) (Supp. 1960): Whenever, in a proceeding instituted under this subsection any official of a State or subdivision thereof is alleged to have committed any act or practice constituting a deprivation of any right or privilege secured by subsection (a), the act or practice shall also be deemed

by the Supreme Court on May 2, 1960. On May 6, 1960, the President signed the Civil Rights Act of 1960. The Court vacated the judgment of the lower court and remanded on the ground that the case must be decided "on the basis of the law now controlling." In so doing, the Court did not reach the merits of the controversy, constitutional or otherwise.

The 1960 act does not preclude the necessary delay involved in the case where new registrars are finally appointed. In such a situation it would seem that the Department of Justice must wait until new evidence of a pattern or practice of discrimination by the new registrars can be developed. Just as the practice of resigning from the registration board in order not to register Negroes seems to be an accepted practice,¹⁶³ similar resignation for the purpose of frustrating judicial action seems most likely.¹⁶⁴

D. Lack of Evidence

It has often been difficult, if not impossible, to obtain the necessary evidence to present to a jury. The possibility of censure or retaliation by the white community may thwart the efforts of some Negroes to obtain testimony. Nevertheless, testimony of Negroes as to their treatment by white election officials can be obtained by the Justice Department in most cases.¹⁶⁵ Somehow, evidence must be presented to show that the registration officials, in administering the registration standards, exercised their broad discretion in bad faith, *i.e.*, discriminatorily. Such evidence of bad faith is difficult to prove.¹⁶⁶

Each of the sanctions previously considered is premised on the fact of discrimination because of race or color—the fact of a difference in treatment accorded to Negroes from that accorded white persons. The evidence to establish such comparisons is extremely scarce for several reasons. Although recent cases tend to emphasize the importance of the registrar's records as a basis for comparison,¹⁶⁷

that of the State and the State may be joined as a party defendant and, if prior to the institution of such proceeding, such official has resigned or has been relieved of his office and no successor has assumed such office, the proceeding may be instituted against the State.

¹⁶² 362 U.S. 602 (1960).

¹⁶³ *Sellers v. Wilson*, 123 F. Supp. 917 (M.D. Ala. 1954); "Equality Before the Law: A Symposium on Civil Rights," 54 Nw. U. L. Rev. 330, 369-70 (1959).

¹⁶⁴ 1960 Senate Hearings 194.

¹⁶⁵ Commission Report 129-30.

¹⁶⁶ Putzel, "Federal Civil Rights Enforcement: A Current Appraisal," 99 U. Pa. L. Rev. 439, 451 (1951).

¹⁶⁷ "Analysis of a random sampling of 200 cards, 198 of which were of white persons, revealed that over 60% had such defects and inconsistencies [as did the challenged Negro registrants], and the defendant Registrar, who has worked with all

many Southern registrars keep no records of rejected applicants.¹⁶⁸ This requires thoughtful action by Negro complainants to obtain witnessed instances in which state officials acted improperly. Alabama's hastily enacted legislation, intended to authorize registrars to dispose of their records after thirty days,¹⁶⁹ has been partially circumvented by title III of the 1960 act.¹⁷⁰ The 1960 act, however, is devoid of any provision that would require registrars to make records in the first instance.

Of the records available, many do not, on their face, disclose evidence of discriminatory application of such evasive standards as the literacy test. Moreover, Southern officials can often occasion critical delay in the delivery of these records once they are requested. The conduct of George C. Wallace, Judge of the Third Circuit Court of Alabama, is illustrative of this point.¹⁷¹ On October 21, 1958, two investigators for the Civil Rights Commission sought to inspect certain voting and registration records. Judge Wallace impounded the voter registration records of Barbour and Bullock counties. When served with a commission subpoena, Judge Wallace told the press: "They are not going to get the records. And if any agent of the

registration cards since 1949, testified that at least 50% had such errors and omissions." *United States v. McElveen*, 180 F. Supp. 10, 13 (E.D. La.), *aff'd, sub nom. United States v. Thomas*, 362 U.S. 58 (1960).

¹⁶⁸ 1959 Senate Hearings, pt. 1, at 191 (testimony of Attorney General Rogers).

¹⁶⁹ Ala. Code tit. 17, § 31 (Supp. 1959) (approved February 24, 1959).

¹⁷⁰ 74 Stat. 88 (1960), 42 U.S.C.A. § 1974 (Supp. 1960). Pursuant to this section, demands have been made for election records in seventeen counties or parishes in six states on the basis of information suggesting racial discrimination. In *In re Palmer*, No. 10 Sundry, E.D. La., July 18, 1960, 5 Race Rel. L. Rep. 774-75 (1960), Judge J. Skelly Wright ordered compliance with the Justice Department's request to inspect records in East Feliciana Parish, Louisiana. Defendant's appeal has been abandoned. Civil No. 18476, 5th Cir. Similarly, in *In re Lucky* and *In re Manning*, Civil Nos. 7971-72 (consolidated), W.D. La., December 6, 1960, the court ordered compliance with the Department's demand to inspect records in Ouachita and East Carroll Parishes. In *In re Dinkens*, 187 F. Supp. 848 (M.D. Ala. 1960), Judge Johnson granted the application to enforce a records demand in Montgomery County. On appeal the decision was affirmed, per curiam. 285 F.2d 430 (5th Cir. 1961). In *In re Bruce*, Civil No. 2390, S.D. Ala., and *In re Lewis*, Civil No. D-C-1-61, N.D. Miss., applications to enforce the government's demands under title III in Wilcox County, Alabama, and Bolivar County, Mississippi, are pending. In *In re Gallion*, Civil No. 1011, N.D. Ala., January 23, 1961, and *United States v. Hildreth*, Civil No. 1012, N.D. Ala., January 23, 1961, an application for enforcement of the government's demand to inspect records in Sumter County, Alabama, and a motion for injunction were filed. The court ruled in favor of the government.

For an opinion involving the Department's motion to preserve records under Rule 34 of the Federal Rules of Civil Procedures see *United States v. Ass'n of Citizens' Councils*, 187 F. Supp. 846 (W.D. La. 1960).

¹⁷¹ Commission Report 70-71.

Civil Rights Commission comes down here to get them, they will be locked up.”¹⁷² The federal district court ordered Wallace to produce the records.¹⁷³ Wallace responded with an elaborate game of hide and seek, delaying obedience to the court order by turning the records over to grand juries. In all, several months elapsed before the records were finally produced and examined.

Direct testimony by white persons is extremely difficult to obtain in cases of this nature. Testimony can usually be obtained only through judicially applied coercion; even then the witness is most likely to be a hostile one, giving evasive answers to the questions propounded. Although the Civil Rights Section of the Justice Department may request the Federal Bureau of Investigation to conduct investigations into matters involving complaints of discrimination,¹⁷⁴ there is a feeling in some circles that this assistance is less than helpful. The FBI, charged with responsibilities in many other areas,¹⁷⁵ may well be reluctant to compromise its effectiveness in those areas with a spirited investigation into charges of discriminatory practices.¹⁷⁶

The difficulties presented in obtaining evidence of discriminatory treatment have considerably prolonged the course of litigation. During such postponement, the Justice Department may find its evidence evaporating due to coercion applied to potential witnesses by employers, “citizens” councils, creditors, trades-people, and the local press.¹⁷⁷

E. The Presumption of Innocence

The Department of Justice over the years has encountered serious difficulties in securing convictions for civil rights violations.¹⁷⁸ Such prosecutive difficulties are compounded in cases of non-violent

¹⁷² *Id.* at 71, citing The Associated Press, night report from Montgomery, Dec. 5, 1958.

¹⁷³ *In re Wallace*, 170 F. Supp. 63 (M.D. Ala. 1959).

¹⁷⁴ Commission Report 129-30.

¹⁷⁵ Hoover, “Cooperation: The Key to Effective Law Enforcement in America,” 12 Syracuse L. Rev. 1 (1960).

¹⁷⁶ “. . . there are also indications that upon occasion investigations in this very difficult and highly specialized area have not measured up to the Bureau’s high standards in the handling of other types of cases.” Emerson and Haber, *op. cit. supra* note 60, at 119.

¹⁷⁷ In one case in a deep southern state, a middle-class Negro who had courageously attempted to vote and to complain to the Department of Justice when he was refused access to the polls, subsequently became so afraid of reprisal that he indicated uncertainty whether he would be willing to testify in court. He asked if he should decide to testify to be given ample notice of the date so that he could first move his family out of the region. Report of the President’s Committee on Civil Rights, *supra* note 97, at 40.

¹⁷⁸ Putzel, *supra* note 166, at 449; Note, 47 Colum. L. Rev. 76, 96 (1947).

racial discrimination, common to the voting field.¹⁷⁹ The defendant in a civil rights case is quite often an influential citizen of his community, while his victim is normally the opposite.

Criminal prosecutions under sections 241 and 242 both require a verdict of guilty by a jury often sympathetic with the defendant.¹⁸⁰ Moreover, section 241 requires proof of a conspiracy. A single registrar, acting independently, will not be liable for discriminatory acts under this section. In a section 242 prosecution, the government must show that the defendant acted "wilfully," intending to deprive the complainant of federal constitutional rights. Emphasis on willful violations of constitutional rights in the majority opinion in *Screws v. United States*¹⁸¹ has had unfortunate effects.¹⁸² This requirement makes it easy for a judge unsympathetic to the prosecution to induce a jury to acquit, as actually happened in the retrial of the *Screws* case.¹⁸³

When section 1983 is employed to secure a money judgment, comparable difficulties are encountered, although the plaintiff is not required to show wilfulness, nor to convince the jury beyond a reasonable doubt. Suits for equitable relief under this section and under the acts of 1957 and 1960 avoid the barrier presented by juries sympathetic with the defendant. Under section 1971 election officials charged with discriminatory treatment of Negroes are tried before a federal judge who is presumably less apt to act on the basis of prejudice. It should be noted, however, that federal judges in the South are under heavy fire from local groups in sit-in and school desegregation cases. The extent to which these individuals can or should be further subjected to such abuse is highly questionable.

The jury trial aspect of the contempt proceedings under the 1957 act tends to weaken the effectiveness of this remedy as illustrated by the *Wallace* case previously considered. In that case the Justice Department was informally advised by Judge Johnson, the presiding federal judge, that

he was unwilling to hold local Judge Wallace for contempt if forty-five days was the maximum penalty he could impose, since it was his feeling that this would enhance Judge Wallace's political position in Alabama without visiting any effective punishment upon him.¹⁸⁴

¹⁷⁹ Commission Report 130.

¹⁸⁰ Emerson and Haber, *op. cit.* *supra* note 60, at 120.

¹⁸¹ 325 U.S. 91 (1945). See Cohen, "The Screws Case: Federal Protection of Negro Rights," 46 Colum. L. Rev. 94 (1946); Note, 55 Yale L.J. 576 (1946); Note, 44 Mich. L. Rev. 814 (1946); *supra* note 114.

¹⁸² Putzel, *supra* note 166, at 450.

¹⁸³ See Carr, *op. cit.* *supra* note 89, at 114.

¹⁸⁴ 106 Cong. Rec. 5684 (daily ed. Mar. 21, 1960).

Although the opinion makes it clear that Wallace failed to respond to the federal court order allowing inspection of registration and voting records, Judge Johnson "found" that Wallace was not in contempt of court.¹⁸⁵

F. Delay in the Courts

Where law enforcement rests in the hands of judicial officers appointed from communities hostile to the law in question, there is a very real risk that the courts will be employed as an instrument of delay. Thus, in *United States v. Raines*,¹⁸⁶ the district court ignored the established policy of determining only the constitutionality of acts as they applied to the case at bar¹⁸⁷ and dismissed the complaint, holding the Civil Rights Act of 1957 invalid because it presumably authorized the Attorney General to seek an injunction against a private citizen for an individual act, divorced completely from state action. But the suit was brought to restrain Georgia election officials from depriving Negroes of the right to register and vote because of their race or color. On direct appeal by the government, the Supreme Court reversed the judgment of the lower court.¹⁸⁸ In September, 1960, two years after the complaint had been filed and seventeen months after the lower court first acted, the government finally obtained a judgment on the merits, directing the Terrell County election officials to permit certain Negroes to vote and to refrain from discriminatory application of literacy tests.¹⁸⁹

Similar delays have resulted from the very nature of the adversary proceeding. For example, defense counsel in *United States v. Alabama*¹⁹⁰ filed a motion to dismiss on fifty-four separate grounds. Fourteen months later, after the Supreme Court had disposed of these contentions¹⁹¹ and remanded the case, the Justice Department filed an amended complaint.¹⁹² Again the defendants moved to dismiss, this time assigning *over one hundred* grounds for the motion.¹⁹³

¹⁸⁵ *In re Wallace*, 170 F. Supp. 63 (M.D. Ala. 1959).

¹⁸⁶ 172 F. Supp. 552 (M.D. Ga. 1959), *rev'd*, 362 U.S. 17, 189 F. Supp. 121 (M.D. Ga. 1960).

¹⁸⁷ "The delicate power of pronouncing an Act of Congress unconstitutional is not to be exercised with reference to hypothetical cases thus imagined." 362 U.S. 17, 22 (1960).

¹⁸⁸ 362 U.S. 17 (1960).

¹⁸⁹ 189 F. Supp. 121 (M.D. Ga. 1960).

¹⁹⁰ 171 F. Supp. 720 (M.D. Ala.), *aff'd*, 267 F.2d 808 (5th Cir. 1959), *vacated and remanded*, 362 U.S. 602, 188 F. Supp. 759 (M.D. Ala. 1960).

¹⁹¹ 362 U.S. 602 (1960).

¹⁹² The amended complaint alleged a "slow down" in processing Negroes for registration and discriminatory application of literacy tests to Negroes and general state failure to make it possible for many qualified Negroes to vote.

¹⁹³ 188 F. Supp. 759, 760 (M.D. Ala. 1960).

Although few of these grounds merited serious consideration by the court,¹⁹⁴ the Justice Department could ill afford to ignore any of them. Each must be researched, again at the cost of time. In the case of *United States v. Alabama* well over two years have elapsed since the initial complaint was filed and still no decision on the merits has been reached. Motions to dismiss have also served to prolong the litigation in *United States v. Raines*¹⁹⁵ and *United States v. McElveen*.¹⁹⁶

G. Limited Effect of Judgment

Even if the foregoing obstacles can be surmounted, success in each of these suits would qualify only a limited number of Negroes. After two years of litigation, only four persons were registered as a result of *United States v. Raines*.¹⁹⁷ Successful prosecution under the 1957 and 1960 acts guarantees only that the few Negroes actually named in the complaint will be registered. At most, the only Negroes who would be qualified by such a decree would be those within the voting subdivision administered by the defendant election officials.

It is unrealistic to expect registrars in Bullock County, Alabama, to desist from discriminating merely because three registrars in adjacent Macon County are placed under a court order. Under a program of judicial enforcement of voting rights we must anticipate that separate legal actions will be required in several hundred communities throughout the South. Proceedings on this piecemeal, case-by-case, county-by-county basis can have only a minimal impact on the problem of getting significant numbers of qualified Negroes registered to vote.

IV. A BETTER SOLUTION

If the present program of judicial enforcement cannot succeed in securing the franchise to the great majority of Southern Negroes, what alternative solutions may be presented? Numerous possibilities were advocated before the past Congress.¹⁹⁸ Although none of these bills was wholly satisfactory,¹⁹⁹ they did suggest two approaches to

¹⁹⁴ *Ibid.* Judge Johnson disposes of all the objections in an opinion scarcely over two pages in length.

¹⁹⁵ 172 F. Supp. 552 (M.D. Ga. 1959), *rev'd*, 362 U.S. 17, 189 F. Supp. 121 (M.D. Ga. 1960).

¹⁹⁶ 177 F. Supp. 355 (E.D. La. 1959), 180 F. Supp. 10 (E.D. La.), *aff'd, sub nom. United States v. Thomas*, 362 U.S. 58 (1960).

¹⁹⁷ 189 F. Supp. 121, 134-35 (M.D. Ga. 1960).

¹⁹⁸ *E.g.*, S. 3001, S. 2814, S. 2785, S. 2783, 86th Cong., 2d Sess. (1960); S. 2722, S. 2719, S. 2684, S. 7535, S. 1084, S. 960, S. 957, S. 499, 86th Cong., 1st Sess. (1959).

¹⁹⁹ An analysis of the major plans is contained in Note, 46 Va. L. Rev. 945, 961-70 (1960).

the problem that would avoid the difficulties inherent in the litigation of each incident of voting discrimination. Both of these approaches would remove the vast discretionary powers now enjoyed by those state officials who, as a class and according to a lengthy history, demonstrate a regrettable enthusiasm for abusing such powers.

The first of these suggested approaches involves the replacement of local registrars with impartial federal referees. These individuals would be appointed by the President whenever he should believe it necessary to secure the franchise to all qualified citizens. These referees would assume all duties of the local registrar, including registration of qualified voters and supervision of all primary and general elections involving congressional or presidential contests. A statute of this nature obviously avoids the several obstacles inherent in judicial enforcement. Its success would rest in the hands of the Chief Executive. A hesitant approach or a reluctance to exercise the powers vested in him would frustrate the effectiveness of this approach.

The major weakness of such a proposal lies in its restricted scope. Under the provisions of article I, section 4 of the Constitution the federal referees would be restricted to the realm of federal elections.²⁰⁰ Where state and federal elections are merged the states would be obligated to adhere to the federal standards. The Southern states would be free, however, to establish separate procedures for state elections, and it is not unlikely that they would do so. At this point article I, section 4 would have spent its force,²⁰¹ and Congress would be relegated to the provisions of the fifteenth amendment. Congress could authorize the appointment of federal referees by the President upon a determination by him that discriminatory practices affecting the electoral process existed.²⁰² Local elections could thus be regulated, but in each instance the appointment would be subject to challenge on "constitutional fact" questions.²⁰³ Thus it is difficult to envision federal legislation that could effectively reach local elections without an ultimate judicial determination that discriminatory conduct was engaged in by persons acting under color of law.

More uniform and democratic suffrage may be established

²⁰⁰ See text *supra* at notes 78-82.

²⁰¹ *United States v. Classic*, 313 U.S. 299 (1941).

²⁰² Alternatively, this power might be delegated to an administrative body constituted for that purpose.

²⁰³ The powers granted Congress by the fifteenth (like the fourteenth) amendment are not plenary, but are restricted by the terms of § 1 of the amendment. *United States v. Classic*, 313 U.S. 299 (1941); *Civil Rights Cases*, 109 U.S. 3 (1883). Thus it is necessary to determine 1) the existence of discriminatory conduct on account of race or color, and 2) that such conduct was engaged in by persons acting under color of law.

throughout the United States by a constitutional amendment²⁰⁴ to read as follows:

Section 1. Every citizen of the United States of the age of twenty-one years or older who has resided in any State or Territory six months and in the voting precinct three months, immediately before offering to vote, shall be entitled to vote at any primary election or other election therein, in which candidates for any public office are nominated or elected, except that the privilege of voting shall not extend to persons in confinement for crime nor to persons adjudicated insane of mind.

Section 2. Congress shall have power to enforce this Article by appropriate legislation.²⁰⁵

Previous constitutional amendments have merely outlawed particular kinds of requirements, thus leaving the states free to establish their qualifications upon the right to vote. As suggested previously, most denials of the right to vote are today accomplished through discriminatory application and administration of such state laws.²⁰⁶ The difficulties inherent in establishing to the satisfaction of a court the existence of discrimination in a given case have been related. "It appears to be impossible to enforce an impartial administration of literacy tests now in force in some states, for, where there is a will to discriminate, these tests provide the way."²⁰⁷

Every one of the qualifications contained in the proposed amendment is drawn from the present law of one, all, or many states.²⁰⁸ By prohibiting complex voting requirements and providing clear, simple and easily enforceable standards, it is submitted that this would be the ultimate step toward free and universal suffrage.

John C. McDonald

²⁰⁴ Commission Report 144.

²⁰⁵ McGovney, *op. cit. supra* note 5, at 181.

²⁰⁶ *Supra* note 10.

²⁰⁷ Commission Report 143.

²⁰⁸ McGovney, *op. cit. supra* note 5, at 181.